

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAUL CASTONGUAY SR.,)
)
)
Plaintiff,)
)
)
v.)
)
DOUGLAS COUNTY ATTORNEY)
OFFICE,)
)
Defendant.)

8:09CV392

**MEMORANDUM
AND ORDER**

The plaintiff filed his Complaint in this matter on October 30, 2009. (Filing No. [1](#).) The plaintiff has previously been given leave to proceed in forma pauperis. (Filing No. [6](#).) The court now conducts an initial review of the Complaint to determine whether summary dismissal is appropriate under [28 U.S.C. §§ 1915\(e\)](#) and [1915A](#).

I. SUMMARY OF COMPLAINT

The plaintiff filed his Complaint on October 30, 2009, against the “Douglas County Attorney[’s] Office.” (Filing No. [1](#) at CM/ECF p. 1.) The plaintiff is currently confined in the Douglas County Correctional Center in Omaha, Nebraska. ([Id.](#) at CM/ECF p. 2.)

Condensed and summarized, the plaintiff alleges that the defendant unconstitutionally restricted his ability to send outgoing legal mail. ([Id.](#) at CM/ECF pp. 4-5.) Under this restriction, the plaintiff “can only [send] mail to [his] public defender,” LeAnne Srb. ([Id.](#)) The plaintiff seeks monetary damages in the amount of \$400,000.00 and a court order directing the defendant to stop restricting his outgoing mail. ([Id.](#) at CM/ECF pp. 7-8.)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. *See 28 U.S.C. §§ 1915(e) and 1915A*. The court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. *28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A*.

A pro se plaintiff must set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible,” or “their complaint must be dismissed” for failing to state a claim upon which relief can be granted. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). Regardless of whether a plaintiff is represented or is appearing pro se, the plaintiff’s complaint must allege specific facts sufficient to state a claim. *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985). However, a pro se plaintiff’s allegations must be construed liberally. *Burke v. North Dakota Dep’t of Corr. & Rehab.*, 294 F.3d 1043, 1043-44 (8th Cir. 2002) (citations omitted).

III. DISCUSSION OF CLAIMS

The plaintiff names the “Douglas County Attorney[’s] Office” as a defendant in this matter. (Filing No. 1 at CM/ECF p. 1.) The court liberally construes claims against the “Douglas County Attorney[’s] Office” as claims against Douglas County, Nebraska. As a municipal defendant, Douglas County may only be liable under section 1983 if its official “policy” or “custom” caused a violation of the plaintiff’s

constitutional rights. *Doe By and Through Doe v. Washington County*, 150 F.3d 920, 922 (8th Cir. 1998) (citing *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978)). An “official policy” involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy. *Jane Doe A By and Through Jane Doe B v. Special School Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). To establish the existence of a governmental custom, a plaintiff must prove:

- 1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity’s employees;
- 2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity’s policymaking officials after notice to the officials of that misconduct; and
- 3) That plaintiff was injured by acts pursuant to the governmental entity’s custom, i.e., that the custom was the moving force behind the constitutional violation.

Jane Doe, 901 F.2d at 646.

Here, the plaintiff does not allege that there is a continuing, widespread, persistent pattern of unconstitutional misconduct by Douglas County’s employees, or that Douglas County’s policymaking officials were deliberately indifferent to or tacitly authorized any unconstitutional conduct. In addition, the plaintiff does not allege that an unconstitutional custom was the moving force behind his injuries. Accordingly, the plaintiff has failed to allege sufficient facts to “nudge” his claims against Douglas County across the line from conceivable to plausible under the *Jane Doe* standard.

However, on its own motion, the court will permit the plaintiff 30 days in

which to amend his Complaint to sufficiently allege a claim against Douglas County in accordance with the Jane Doe standard. Any amended complaint shall restate the allegations of the plaintiff's prior Complaint (filing no. 1), and any new allegations. Failure to consolidate all claims into one document will result in the abandonment of claims. If the plaintiff fails to file an amended complaint in accordance with this Memorandum and Order, the plaintiff's claims against Douglas County will be dismissed without prejudice for failure to state a claim upon which relief may be granted.

IT IS THEREFORE ORDERED that:

1. The plaintiff shall have until **February 5, 2010**, to amend his Complaint and clearly state a claim upon which relief may be granted against Douglas County, in accordance with this Memorandum and Order. If the plaintiff fails to file an amended complaint, the plaintiff's claims against Douglas County will be dismissed without further notice for failure to state a claim upon which relief may be granted.
2. In the event that the plaintiff files an amended complaint, the plaintiff shall restate the allegations of the current Complaint (filing no. 1), and any new allegations. Failure to consolidate all claims into one document may result in the abandonment of claims.
3. The clerk of the court is directed to set a pro se case management deadline in this case using the following text: Check for amended complaint on **February 8, 2010**, and dismiss if none filed.

4. The plaintiff shall keep the court informed of his current address at all times while this case is pending. **Failure to do so may result in dismissal without further notice.**

Dated January 4, 2010.

BY THE COURT

s/ Warren K. Urbom
United States Senior District Judge